IBRARY
ME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 30
JOHN F.

No. 298

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

IN THE MATTER OF

H. R. WEISSBERG CORPORATION, a corporation,
Debtor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ALBERT E. JENNER, JR.
GILBERT H. HENNESSEY, JR.
JOHN J. CROWN
NICHOLAS D. CHABRAJA
Attorneys for Petitioners Herbert M. Rosenthal and Dunbar Builders Corporation

JENNER & BLOCK
135 South La Salle Street
Suite 3300
Chicago, Illinois 60603
Of Counsel

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	4
Reasons for Granting Certiorari	8
1. The decision of the Seventh Circuit in this case is in conflict with the decision of the Tenth Circuit in *Smith* v. *Save-Rite*, 178 F.2d 507 (10th Cir. 1949)	8
2. The Court of Appeals sanctioned such a departure by the district court from the accepted and usual course of judicial sale procedure, as to call for an exercise of this Court's power of supervision	10
3. One of the issues involved herein is an important question of federal law which has not been, but should be, decided by this court: Whether subjective esthetic criteria are proper factors for consideration by a district court in confirming a judicial sale pursuant to § 116(3) of the Bankruptcy Act. (11 USC § 516(3))	11
Conclusion	13

PAGE

Appendix

Oral Opinion of December 17, 1968 ..... App. 1

Memorandum Decision and Order ..... App. 7

Opinion on Appeal ..... App. 32

(dissent) ..... App. 40

Order denying rehearing en banc ..... App. 49

Supplemental Opinion on Appeal ..... App. 49

TABLE OF AUTHORITIES

Court Decisions

In re Prairie Coal Co., 40 F. Supp. 894 (E.D. Ill. 1941) 12

Smith v. Save-Rite, 178 F.2d 507 (10th Cir. 1949) 8, 9, 10

In re Winthrop Mills, 109 F. Supp. 322 (S.D. Me. 1952) 12, 13

Statutes

11 U.S.C. §516(3) 3, 11

28 U.S.C. §1254(1) 2

In the Supreme Court of the United States

OCTOBER TERM, 1968

NO. .

IN THE MATTER OF

H. R. WEISSBERG CORPORATION, a corporation,
Debtor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment and the majority opinion of the United States Court of Appeals for the Seventh Circuit entered in this cause on April 4 and 25, 1969.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are not yet reported. They appear in the appendix, pp. 32-48, *infra*. A petition for rehearing *en banc* was filed and denied on May 20, 1969. Also on May 20, 1969, Judges Fairchild and Cummings issued an additional *per curiam* opinion with Judge Swygert again dis-

senting. The supplemental opinion and dissent are unreported to date and appear in the appendix, pp. 49-51, *infra*.

The trial court rendered an oral opinion on December 17, 1968, which was followed by a written order and memorandum confirming the sale on January 15, 1969. These are also unreported and appear in the appendix, pp. 1-6, 7-31, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on April 4, 1969; the opinion of the Court of Appeals was filed on April 25, 1969; a petition for rehearing *en banc* was denied on May 20, 1969, at which time a supplemental opinion was also filed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. When supervising a sale required to be by sealed bid, is it an abuse of discretion for the district court to allow one of several bidders to revise his bid after the announced close of bidding and the publication of all the sealed bids submitted, while not allowing the other bidders to amend their bids?

> *There is a direct conflict between the Tenth Circuit and the Seventh Circuit with respect to whether or not a bidder at a judicial sale may amend a sealed bid after submission and publication but before confirmation. This Court should grant certiorari and resolve that conflict.*

2. When supervising a sale required to be by sealed bids, is it an abuse of discretion for the district court to sanction private negotiations after the close of bidding

and publication of all the sealed bids, between the trustee and one of the bidders, but not with any of the others, which negotiations resulted in material adjustments in that bidder's sealed bid?

The bidding procedures followed by the district court were so haphazard, fraught with irregularities and aggravated unfairness as to amount to a gross abuse of discretion that requires an exercise of this Court's power of supervision.

3. When evaluating several bids and approving and confirming one of those bids in a judicial sale, is it an abuse of discretion for the district court to rely upon subjective esthetic considerations which relate to that bidder's announced intent as to how he plans (but is not bound) to develop the property if it is awarded to him?

This issue is an important question of federal bankruptcy law which has not been, but should be, decided by this Court.

STATUTES INVOLVED

Section 116 of Chapter X of the Bankruptcy Act provides in pertinent part (11 U.S.C. §516 (3)):

> "§ 116. . . . Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties in this chapter conferred and imposed upon him and the court—
>
> * * *
>
> (3) authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve; . . ."

STATEMENT OF THE CASE

The trustee of the Estate of H. R. Weissberg Corporation, in a proceeding under Chapter X of the Bankruptcy Act, was authorized to offer the Edgewater Beach Hotel (hereinafter "Hotel") for sale, either free and clear of all claims thereto, or in the alternative subject to all encumbrances. [Item 9, pp. 1-2].[1]

The trustee initially offered the property for sale on return of oral bids in open court on October 9, 1968. See, (Tr. of October 9, 1968). The district court rejected all bids received on that date as being insufficient in amount and authorized the trustee to sell the Hotel at private sale without notice, but subject to the approval of the court. (Item 11).

Thereafter the trustee resumed negotiations with various bidders and with the consent of the court advised all interested parties that they should submit sealed bids to be opened on November 22, 1968, in the presence of the court. (Item 23, App. p. 9). Thereafter, at a hearing held on November 22, 1968 at 2:00 p.m., four sealed bids were received, opened and read aloud in open court. (Tr. of November 22, 1968, pp. 8-29).

Counsel for the trustee then requested a three-hour recess for the express purpose of enabling the bidders to amend, i.e., increase, their bids, again under seal. (Tr. of November 22, 1968, p. 44). Bidders were advised that the revised bids submitted on November 22, 1968 would be final. (Tr. of November 22, 1968, pp. 48, 50).

[1] These appeals were heard on an accelerated briefing schedule and no appendix was printed. The record on appeal consisted of twenty eight numbered items and transcripts of four proceedings. The designation "Item" refers to the item in the record on appeal in the Seventh Circuit Court of Appeals and the abbreviation "Tr." refers to the transcript.

Three hours later the hearing was resumed and all four of the bidders, including your petitioners, returned increased bids under seal. (See, Items 14, 16). In response to a question from the attorney representing the Securities and Exchange Commission as to the finality of the bidding, the trustee announced that "this is the final bidding hour as far as the trustee is concerned, unless the court shall direct otherwise." (Tr. of November 22, 1968, p. 50).

Of particular importance is the bid submitted by Marshall Holleb, as Nominee, (hereinafter "Holleb"), the ultimately successful bidder. Holleb offered to pay $800,000 for the trustee's equity in the Hotel

> "plus the assignment of insurance proceeds . . . or, at the option of the Trustee, an amount equal to the value of such fire loss as agreed upon between the trustee and the buyer."[2] (Item 23, Exhibit A, pp. 1-3).

Before adjournment, the attorney for the Securities and Exchange Commission inquired whether it would be acceptable if any of the bidders increased their cash offer during the time the bids were under consideration. (Tr. of November 22, 1968, p. 66). The Trustee said that it would not be acceptable. (Tr. of November 22, 1968, p. 66). The judge then said, "I think the position I understand the trustee to have taken is that as far as the trustee is concerned he is finished with asking for bids." (Tr. of November 22, 1968, p. 67). The court took the bids

[2] Included among the assets for sale was a claim owned by the debtor's estate on account of damage and loss from a prior fire at the Hotel. Bidders were informed in open court that the Trustee had been offered $72,000 by the insurance carrier to settle the claim. (Tr. of December 17, 1968, p. 51).

under advisement pending further analysis by the court, the trustee and the Securities and Exchange Commission. (Tr. of November 22, 1968, p. 67).

However, contrary to the bidding limitation imposed by the trustee, counsel for the trustee and Holleb entered into negotiations that resulted in material adjustments in the Holleb bid. The trustee did not conduct negotiations with petitioners.

On November 27, five days after the close of bidding, Holleb wrote the trustee indicating his agreement to purchase the fire loss claim for $200,000, thereby purporting to raise his bid to $1,000,000, in cash. (Item 23, Exhibit B). This letter changed the Holleb bid from $800,000 plus some subjective value for the fire loss to a firm cash offer of $1,000,000.

Additional changes in the Holleb bid, including an agreement to indemnify the estate for secured claims against personal property were made in two separate letters to the trustee, both dated December 2, 1968 each containing the following language:

> "In connection with the undersigned's offer to you to purchase the above-captioned property pursuant to a letter dated November 2, 1968, *as amended* by a letter dated November 27, 1968, . . .". (emphasis added) (Item 23, Exhibits C, D).

Upon learning of Holleb's November 27 and December 2 letters to the trustee, Harold Shlensky (hereinafter "Shlensky"), another of the bidders, attempted to amend his bid by waiving any right to any insurance proceeds received by the estate, thereby purporting to increase the value of his bid. (Item 16, Shlensky letter dated December 6, 1968).

Contrary to the actions of the other bidders, your petitioners honored the trustee's direction that bids be closed as of November 22, 1968, and did not amend their bid in reliance upon the trustee's assertion that increases in cash offers received after November 22, 1968, would not be considered.

Contrary to the bidding limitation imposed on November 22, 1968, the trustee received the revised Holleb bid and the district court afforded Holleb's December 2 bid "nunc pro tunc" treatment. (Item 23, p. 8, App. pp. 16-17). He refused to treat the Shlensky amendment of December 6 on the same terms; and your petitioners were not afforded an opportunity to amend their bid. (Item 23, p. 8, App. pp. 16-18).

On December 17, 1968, the district court approved the sale of the Hotel to Holleb on the basis of his revised and amended bid. The district court, in oral remarks, indicated that approval of the Holleb bid was based upon a preference for the Holleb "plan" for eventual development of the property. (Tr. of December 17, 1968, pp. 55-64; App. pp. 1-6).

On December 17, 1968, the district court announced an oral opinion, (App. pp. 1-6), and directed counsel for the trustee to prepare a draft order confirming the revised Holleb bid. (App. p. 6). On January 15, 1969, the order confirming the sale of the Hotel to Holleb was entered. (Item 23). On appeal the Court of Appeals for the Seventh Circuit entered a 2 to 1 decision affirming. (App. pp. 32-48). Rehearing *en banc* was denied on May 20, 1969, one judge dissenting (App. p. 49).

No questions of fact are involved.

REASONS FOR GRANTING CERTIORARI

1. THE DECISION OF THE SEVENTH CIRCUIT IN THIS CASE IS IN CONFLICT WITH THE DECISION OF THE TENTH CIRCUIT IN SMITH v. SAVE-RITE, 178 F. 2d 507 (10th Cir. 1949).

The district court permitted Holleb, who was a low bidder at the trustee's sale on receipt of sealed bids, to submit a higher bid after the close of bidding. It was an abuse of discretion for the district court to permit an apparent low bidder to increase his bid while the bids were under consideration and after the amount of the other bids was made public. Holleb's increase in the dollar amount of his bid after the close of bidding received *nunc pro tunc* treatment and was allowed by the district court and the Court of Appeals as consistent with the concept of finality of bidding.

Clearly, this is an untenable position. In effect, the district court ruled that November 22, 1968, was the final bidding date for all bidders while at the same time permitting Holleb to subsequently amend his bid. The trial judge had no warrant for such unequal treatment of competing bidders and his ruling is in direct conflict with *Smith* v. *Save-Rite*, 178 F. 2d 507 (10th Cir. 1949).

THE COURT OF APPEALS DECISION

The majority opinion of the Court of Appeals erroneously upheld the ruling of the district court but avoided discussion of the important legal principle at issue. The holding of the Court of Appeals is set forth as follows:

> "We cannot agree that the fact that the bidders were not required, by advance prescription, to make offers of identical, or alternative sets of conditions, *nor the fact that the Holleb November 22 offer had an alternative subject to later negotiation, which was carried out, so undermine the integrity or dignity of the sale that it was an abuse of discretion* not to reopen it under more specific preconditions." (App. p. 39; emphasis added).

This holding avoids the basic issue of fundamental unfairness to serious bidders who submitted sealed bids in good faith only to see the property knocked down by a bid submitted after the close of bidding. The district court's preoccupation with dignity, a refrain picked up by the Court of Appeals, skirts the task of defining the conduct that constitutes a gross abuse of discretion.

The only rationale supplied by the Court of Appeals in support of their holding on this critical issue was that it is arguable, at least in form, that on November 27 Holleb was merely filling in his November 22 offer. (App. p. 35). It is clear that he filled in his offer—he filled it in to the tune of $200,000. The legal issue that the Court of Appeals avoided is whether it is within the judicial discretion of the district court to approve such a procedure.

Fundamental fairness requires that bids received after the close of bidding at a judicial sale cannot be considered. In *Smith* v. *Save-Rite*, 178 F. 2d 507 (10th Cir. 1949), the Tenth Circuit refused to permit a bidder to submit a higher bid after the announced close of sealed bidding. The Tenth Circuit condemned such a procedure stating:

> "A practice of permitting an unsuccessful bidder at a public auction, through sealed bids, *after the amount of the highest and best bid at the auction had been disclosed,* to submit a second bid when the mat-

ter comes on for confirmation of the sale, would tend to destroy the efficacy of auctions through sealed bids." (178 F. 2d 507, 510; emphasis added).

The facts of this case present a situation that the Tenth Circuit's ruling was designed to avoid. Here, Holleb waited to learn the extent of the other bids and then after the close of bidding revised his bid to the amount necessary to overreach the other bidders.

This Court should hear this case to resolve the direct conflict between the holding of the Court of Appeals herein and the holding in *Smith* v. *Save-Rite,* 178 F. 2d 507 (10th Cir. 1949).

2. THE COURT OF APPEALS SANCTIONED SUCH A DEPARTURE BY THE DISTRICT COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL SALE PROCEDURE, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The Holleb bid of November 22, 1968, purported to grant an option to the trustee to elect to negotiate the sale of the fire insurance claim to Holleb or to keep the same for the benefit of the estate. It is axiomatic that an option arises and can be exercised only *after* acceptance of the bid that gives rise to the option. If the bid was accepted as written, the trustee could then have elected to keep the fire claim or sell it to Holleb for a negotiated sum.

At oral argument in the Court of Appeals it was learned that after the close of bidding, but *before* approval of any bid, the attorney for the trustee negotiated with Holleb so as to secure the Holleb November 27, 1968, amendment of $200,000. In effect, the trustee was allowed to, and did,

select Holleb as the purchaser and Holleb was permitted to qualify as such by raising his bid so as to make it the highest offer *after* all other bids were final. The trustee's counsel was admittedly involved in negotiations with Holleb which had the effect of over-reaching the other participants.

The approval of such a procedure by the district court, further sanctioned by the Court of Appeals, creates a precedent that will undermine the public's faith in judicial sales and discourage prospective purchasers from participating therein. For this reason, this Court should exercise its power of supervision over the lower courts to review this departure from accepted and normal judicial procedure.

3. ONE OF THE ISSUES INVOLVED HEREIN IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT: WHETHER SUBJECJECTIVE ESTHETIC CRITERIA ARE PROPER FACTORS FOR CONSIDERATION BY A DISTRICT COURT IN CONFIRMING A JUDICIAL SALE PURSUANT TO § 116 (3) OF THE BANKRUPTCY ACT. (11 USC §516 (3)).

The issue this Court should consider is whether, and to what extent, public interest is a proper factor for consideration by the district court in confirming a judicial sale under the Bankruptcy Act.

The majority of the panel of the Seventh Circuit in the case at bar appraised this question as follows:

> "There are some circumstances under which a court may consider the fact that a particular bidder will make a use of the property which serves the community interest." (App. p. 39).

The majority of the panel which upheld the district court cited *In re Prairie Coal Co.*, 40 F. Supp. 894 (E.D. Ill. 1941) in support of the above quoted observation. *Prairie Coal*, however, involved a sale to a bidder who promised the court that he would keep the object of the sale operating as a viable business concern to provide employment in a depressed area. This public interest factor was exceptional and an appropriate case for departure from the general rule that public interest factors have no place in determining which of several bids is the highest and best. The only known departures from this rule have been in the unusual situation involving the public interest in continuing employment of a large number of persons in depressed areas. See *Prairie Coal, supra* and *In re Winthrop Mills*, 109 F. Supp. 322 (S.D. Me. 1952).

The dissenting opinion in the Court of Appeals characterized the use of esthetic criteria in these terms:

> ". . . [T]he judge's statements at face value . . . permitted . . . extraneous and improper consideration [s] to influence his decision. . . . Holleb's statement with regard to his plans to develop the property in no way bound him and of course could not be accomplished without approval of the city's building department and zoning board. . . . [T]he request [for information with respect to ultimate development plans] was a complete afterthought. . . . [T]he district judge's consideration of ultimate use . . . was [a]n additional irregularity . . . ". (App. p. 46).

In this case, the Holleb "use" taken into account by United States District Judge, James B. Parsons, was nothing more than an architect's will-o'-the-wisp first impression. In any event, municipal authorities and not the United States District Court are charged with the duty of controlling the development of real estate in the City of

Chicago. In *Prairie Coal* and *Winthrop Mills*, unlike the case at bar, only the United States District Court could act to protect the public interest in maintaining employment.

Adding consideration of esthetics to the criteria to be considered in making an award in a judicial sale creates a new precedent whch is so vague as to undermine the entire sale procedure. This Court should take this opportunity to speak on this important question on which it has not previously spoken.

CONCLUSION

The district court has allowed, and the Court of Appeals has sanctioned, the amendment of a sealed bid after submission, publication and after the close of bidding.

The district court also permitted, and the Court of Appeals sanctioned, private negotiations between a low bidder and a court-appointed trustee and his representatives subsequent to the submission of sealed bids, which negotiations resulted in that bidder's increasing his bid so as to make it the highest bid.

The district court in awarding the property, relied upon subjective esthetic criteria not binding upon or even controlled by the bidder to whom he awarded the property. This the Court of Appeals has also sanctioned.

The procedure pursued in the district court and approved by the Seventh Circuit, as pointed out in the dissent, resulted in a procedure which ". . . was so haphazard and fraught with irregularities and aggravated unfairness as to amount to a gross abuse of discretion." (See Judge Swygert's dissenting opinion, App. p. 47).

In order to resolve the above described conflict between the circuits, in order to speak upon what criteria are properly within the ambit of considerations for the federal courts in confirming awards of real property sold under the Bankruptcy Act, and in the exercise of its supervisory powers over the lower courts, this Court should grant certiorari.

Respectfully submitted,

ALBERT E. JENNER, JR.
GILBERT H. HENNESSEY, JR.
JOHN J. CROWN
NICHOLAS D. CHABRAJA
Attorneys for Petitioners
Herbert M. Rosenthal and
Dunbar Builders Corporation

JENNER & BLOCK
135 South La Salle Street
Suite 3300
Chicago, Illinois 60603
RAndolph 6-0220
Of Counsel